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No. 84-1460

In The

Supreme Court of the United States

October Term, 1984

ALL ALEXANDER L. KIELLAND LITIGANTS,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY NORWAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PHILLIPS PETROLEUM COMPANY NORWAY IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Sixth Circuit err in affirming per curiam the District Court's dismissal of Petitioners' claims against Phillips Petroleum Company Norway ("Phillips Norway") for lack of in personam jurisdiction where Petitioners attempted to effect service on Phillips Norway only by serving its parent, and Phillips Norway and its parent were determined, as a factual matter, to be separate and distinct entities for purposes of jurisdiction and service?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PHILLIPS PETROLEUM COMPANY NORWAY IN OPPOSITION

Respondent prays that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The personal injury claims asserted below against Phillips Petroleum Company Norway ("Phillips Norway") arose from the capsizing of the Alexander L. Kielland (the "Kielland") in the Norwegian sector of the North Sea. That incident had no connection whatsoever with Ohio, where petitioners' counsel chose to file the claims at issue. The Kielland was a Norwegian flag vessel registered in Norway.

It was owned by Stavanger Drilling II A/S of Stavanger, Norway, a business entity organized and existing in Norway under the laws of Norway, and was under bareboat charter to Phillips Norway on behalf of itself and its eight European co-venturers. The Kielland was never in United States territorial waters. It was designed and constructed in France by French companies. The crew was provided by Stavanger Drilling pursuant to an agreement which was entered into in Norway and is subject to the laws of Norway. The official investigations of the accident were conducted by the Norwegian government and the Stavanger, Norway, Police.[1]

All 212 persons on board the Kielland when it capsized were permanent residents of countries other than the United States. No evidence was offered at the lengthy hearing conducted by the district court that any of the petitioners had any connection with Ohio.[2] Their claims could all be heard in Norwegian courts which, unlike the court selected by petitioners' counsel, are properly positioned to adjudicate such disputes. In addition, over 200 of the 212 Kielland claimants have accepted settlement payments and executed general releases in Norway or countries other than the United States.

Like the accident itself, Phillips Norway has no connection with Ohio. It is a Delaware corporation which does not do business in Ohio and has no office, employees or agents (for service of process or otherwise) in that state. Petitioners therefore attempted to effect service upon

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[1] The persons who conducted those investigations and the witnesses interviewed, as well as the owner, designers and builders of the Kielland, are all beyond the subpoena power of the District Court for the Northern District of Ohio.

[2] Petitioners' assertion at page two, note two of the Petition for Writ of Certiorari (the "Petition") that claimant Rolf Arthur Reme was a resident of the northern district of Ohio is unsupported by the record.

Phillips Norway by delivering summonses and complaints to an Ohio office of Phillips Petroleum Company ("Phillips Petroleum"), its parent corporation, apparently on the theory that the two corporations should be considered one and the same entity for purposes of service and jurisdiction.

After an extensive four-day evidentiary hearing, the district court found that Phillips Petroleum and Phillips Norway could not be so considered. That finding was supported by evidence that, among other things, the day-to-day operations of Phillips Norway are conducted exclusively in Norway; its assets, financial operations, accounting records and corporate affairs are independent of those of Phillips Petroleum; there is no director of Phillips Norway who is also a director of Phillips Petroleum; Phillips Norway pays its own income taxes to the Kingdom of Norway; there has been no commingling of funds, property or assets of the two corporations; Phillips Petroleum's purchases of oil from Phillips Norway have been at competitive commercial rates; loans between the two companies have been repaid, with interest at competitive commercial rates; and Phillips Norway operates with its own capital and is a viable corporation with considerable assets.

The district court's holding that jurisdiction over Phillips Norway could not be acquired through Phillips Petroleum was affirmed per curiam on appeal. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, arguing principally that the dismissal and affirmance were based on a misapplication of due process requirements and a misunderstanding of the circumstances under which jurisdiction could be acquired in Ohio over a nonresident subsidiary through its parent. That petition was denied. None of the judges of the Sixth Circuit even requested a vote on the suggestion for rehearing en banc, and the original hearing panel was satisfied that "the issues raised in the petition were fully considered upon the original submission." Order of the Sixth Circuit of

December 5, 1984 ("the Sixth Circuit Order"), at Appendix 24A-25A.[3]

The Sixth Circuit Order both announced the denial of the petition for rehearing and supplemented the Sixth Circuit's initial opinion of September 17, 1984. The Sixth Circuit Order expressly approved the lower court's findings that the two corporations "were not sufficiently integrated to be considered one entity for jurisdictional purposes" and that the activities of the parent and subsidiary had not been proven to be "so closely interconnected that the acts of one could be said to be the acts of the other." Sixth Circuit Order at Appendix 25A. Given those findings, the Sixth Circuit concluded that "service on Phillips Petroleum did not operate as service on Phillips Norway." *Id.*[4]

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISIONS BELOW WERE BASED ON FACTUAL FINDINGS WHICH DO NOT WARRANT REVIEW BY THIS COURT

The district court's dismissal of petitioners' claims against Phillips Norway, and the Sixth Circuit's affirmance of that dismissal, were grounded wholly in the facts of this case. In an effort to create adequate grounds for the granting of a writ of certiorari, petitioners attempt to imbue this case with constitutional significance. But there is no constitutional issue before this Court. Petitioners also attempt to manufacture a conflict among the federal courts, but no

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[3] The opinions and orders of the courts below are reproduced in the Appendix to the Petition (the "Appendix") and are cited by reference thereto.

[4] Neither the initial opinion of September 17, 1984 nor the subsequent supplementation of December 5, 1984 was recommended for full-text publication.

such conflict exists. The disposition of this case did not turn on the application of constitutional law or an unsettled legal principle but simply upon factual findings with which petitioners disagree.

On the facts, both the district court and Sixth Circuit concluded that the contacts of Phillips Petroleum with the State of Ohio could not be attributed to Phillips Norway. Since Phillips Norway itself had no contact whatsoever with petitioners' chosen forum, service of process could not be effected on nor in personam jurisdiction exercised over Phillips Norway. Petitioners now seek further reconsideration of the factual findings on which the resulting dismissal and affirmance were based, but it has not been and should not be the practice of this Court to grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioners have not and cannot show "special and important reasons" for the grant of the requested writ. *See* Sup. Ct. R. 17.1.

A. There Is No Constitutional Issue Before This Court.

To pique the interest of this Court, petitioners initially posit for review a "constitutional" question concerning the due process limits of in personam jurisdiction. Petitioners claim that this case turns on whether the jurisdictional inquiry in admiralty actions should focus on the defendant's "aggregate contacts" with the United States as a whole (petitioners' "Fifth Amendment standard") or on its contacts with the selected forum (petitioners' "Fourteenth Amendment standard"). Petition at 10-13.

Petitioners' question is purely hypothetical— this case did not turn on any constitutional determination. As the Sixth Circuit explained:

> *The case does not hinge upon an application of a Fifth versus a Fourteenth Amendment due process*

> *approach as suggested by the appellants*. This case hinges upon a line of cases that held if a subsidiary is tantamount to a mere department or division of the parent, then the subsidiary and the parent are treated as one for jurisdictional purposes. [Citations omitted.]
>
> *The district court carefully examined the nature of this parent-subsidiary relationship* and concluded that the plaintiffs had not met their burden of showing that the activities of the parent and subsidiary are so closely interconnected that the acts of one could be said to be the acts of the other. The district court found that Phillips Petroleum and Phillips Norway were not sufficiently integrated to be considered one entity for juris'':tional purposes . . . . Consequently, service on Phillips Petroleum did not operate as service on Phillips Norway. [Sixth Circuit Order at Appendix 24A-25A (emphasis supplied).][5]

Since Phillips Petroleum and Phillips Norway were properly found to be separate and distinct entities for jurisdictional purposes, petitioners' service on Phillips Petroleum did not constitute service on Phillips Norway. The Sixth Circuit's affirmance was not based on any issue of jurisdictional due process, but on the factual nature of the relationship between the two corporations and the resulting failure of service. Petitioners' rhetoric cannot create a constitutional issue where none existed or exists.

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[5] While petitioners quote most of the substantive portions of the Sixth Circuit Order in their Statement of the Case, the omissions are most telling. Petitioners delete both the Sixth Circuit's conclusion that this case "does not hinge upon an application of a Fifth versus a Fourteenth Amendment due process approach" and its finding that the district court "carefully examined the nature of [the] parent-subsidiary relationship" at issue. *See* Petition at 9-10.

B. This Case Does Not Give Rise To Any Conflict Among The Federal Courts

1. The Federal Courts Are Not Utilizing Different Legal Tests In Assessing Corporate Separateness For Purposes Of Jurisdiction And Service.

Because there is no constitutional issue before the Court, the majority of the Petition is devoted to an attempt to manufacture a conflict among decisions of the federal courts. Petitioners contend that the federal courts are applying three inconsistent and "essentially distinct" legal tests in assessing corporate separateness for purposes of jurisdiction and service: "corporate formality," "unity of enterprise" and "control." Petition at 19. Petitioners fail to cite any decision or other authority that discusses or even acknowledges the existence of three "essentially distinct" *legal* tests. That is not surprising, as there are no such different legal tests.

Judicial decisions as to whether the contacts of a resident corporation should be imputed to a nonresident affiliate turn on a factual, not legal, analysis. The "divergent" case law on which petitioners rely is not the result of applying differing legal standards; it is the natural product of a case-by-case factual inquiry in which courts focus on the characteristics of the particular relationship in question. While courts have focused on different factual attributes of the parent-subsidiary relationship in deciding whether service has been effected and personal jurisdiction can be exercised, they have not formulated inconsistent legal tests which limit their underlying inquiry to certain test criteria. Particular attributes have been examined only in the context of all of the facts and circumstances surrounding the relationship under review.

The cases cited by petitioners confirm the uniformity with which the federal courts of appeals have approached

the requisite inquiry. In *Quaker State Dyeing and Finishing Co. v. ITT Terryphone Corporation*, 461 F.2d 1140, 1143 (3d Cir. 1972) (cited in Petition at 15-16), for example, the Third Circuit recognized that the "issue is factual, upon which all relevant evidence must be considered . . . . [T]here is no single, simple test." In *Hargrave v. Fibreboard Corporation*, 710 F.2d 1155, 1160 (5th Cir. 1983) (cited in Petition at 16), the Fifth Circuit announced that "[a]ll the relevant facts and circumstances surrounding the operations of the parent and subsidiary must be examined to determine whether two separate and distinct corporate entities exist." Similarly, the Eighth Circuit explained in *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 637 (8th Cir. 1975) (cited in Petition at 16), that "[n]o all-embracing rule has been laid down under which the relationship between two corporations may be determined. The circumstances in each case must be examined . . . ." Petitioners' district court decisions — even those which purportedly adopted the "acid test" of "corporate formality" — are to the same effect. *See, e.g., Stanley Works v. Globemaster, Inc.*, 400 F. Supp. 1325, 1331-1332 (D. Mass. 1975) (cited in Petition at 16) ("[C]ourts have become more willing to look beyond the form to the substance of a corporate relationship . . . . [A] wide range of evidence — corporate structure, personnel, operations — is relevant.")

Petitioners' own cases thus recognize that the critical inquiry is factual in nature, focusing not on a particular determinative characteristic but on all facts and circumstances. The three "essentially distinct" tests are artificial and of petitioners' own making. Such creativity does not provide a basis for challenging the decisions of the courts below in this case.

2. The Holdings Of The Courts Below Were Properly Based On A Complete Examination Of The Relationship Between Phillips Petroleum And Phillips Norway.

Having invented their three "essentially distinct" legal tests, petitioners assert (in a classic example of bootstrap reasoning) that the district court adopted a "corporate formality" test in conflict with the views of "most courts." Petition at 16. The courts below, however, did not limit their analysis to any one aspect (formalities or otherwise) of the relationship between Phillips Petroleum and Phillips Norway. The district court engaged in an extensive factual inquiry which considered all of the facts and circumstances surrounding the relationship between the two corporations, and that inquiry was reviewed and approved by the Sixth Circuit. Petitioners' position is the product of a wishful, revisionistic reading of the opinions of the courts below.

Petitioners' contention that the district court applied a "corporate formalities" test is based on the court's statement that the contacts of one corporation would not be attributable to its affiliate "so long as the separation . . . is real and not merely superficial." Petition at 14, *quoting* Memorandum of Opinion at Appendix 16A. That language, however, does not suggest a myopic focus on mere formalities, either when standing alone or considered in context. It was taken from *In Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 n.26 (6th Cir. 1972), where the Sixth Circuit's analysis of the parent-subsidiary relationship, while not relevant to its decision, included examination of corporate purchasing patterns, negotiations conducted for the parent by another subsidiary and unspecified "other circumstances." *Id.*

Petitioners also ignore the cases discussed most extensively by the district court in analyzing whether the separation at issue here was "real and not merely superficial."

Both *Walker v. Newgent*, 583 F.2d 163 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979), and *Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 (2d Cir.), *cert. denied*, 375 U.S. 831 (1963), involved a wide-ranging factual examination of the relationship between the two entities in question. Those cases did not turn on a rigid application of a "corporate formalities" test. Indeed, petitioners could have pulled language from *Blount* to support any or all of their alleged tests and actually did cite *Walker* as proof that courts do not confine the jurisdictional inquiry to mere formalities. *See Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d at 698 (subsidiary found not to be "department," "agent," "implement" or "puppet" of parent); Petition at 19 (citing *Walker*).[6]

The district court's decision does not evidence reliance on petitioners' "formalities" test. The cases cited and discussed indicate that the court recognized the need for a broad inquiry which considered all of the facts and circumstances pertaining to the relationship between Phillips Norway and Phillips Petroleum. Just such an inquiry was undertaken here — as petitioners have conceded, "the District Court held an evidentiary hearing. Plaintiffs filed hundreds of exhibits and the transcripts of twelve depositions, while defendants presented four days of testimony." Petition at 3. It was only after engaging in that exhaustive factual analysis and imposing the appropriate burden of proof on petitioners that the district court determined that

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[6] Incredibly, petitioners assert that the district court "relied heavily" on *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), which was not discussed in its Memorandum of Opinion. Petition at 14. At most, the district court relied on *Cannon* for a proposition with which petitioners agree: "the parent-subsidiary relationship does not, by itself, allow the exercise of jurisdiction over one entity on the basis of the other's contacts with the forum." Petition at 14 n.16.

the demonstrated relationship between the corporations was not such that jurisdiction over Phillips Norway could be acquired through Phillips Petroleum.

The Sixth Circuit was fully satisfied with the district court's factual inquiry, finding on the full record before it that the nature of the parent-subsidiary relationship had been "carefully examined." Sixth Circuit Order at Appendix 24A. The Sixth Circuit was equally satisfied with the propriety of the resulting dismissal of petitioners' claims against Phillips Norway. Like the district court, the Sixth Circuit did not limit its review to any one aspect of the relationship between the two corporations or rely on only one of petitioners' three "essentially distinct" legal tests. Instead, the affirmance invoked expansive concepts of corporate interrelationship — whether the subsidiary was "closely interconnected" with its parent, whether the subsidiary was "sufficiently integrated" with its parent, and whether the subsidiary was a "mere department or division" of its parent.[7] Sixth Circuit Order at Appendix 24A-25A.

Petitioners' real complaint is not with the rule of law applied by the lower courts here or any alleged conflict among the federal courts, but with the factual findings of the district court and the Sixth Circuit's affirmance of those factual findings. Such a complaint does not provide a basis for granting a writ of certiorari.

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[7] Even if federal courts actually did disagree as to the legal test to be applied in deciding whether jurisdiction over and service upon a nonresident corporation could be obtained through its resident affiliate, the nature of the district court and Sixth Circuit holdings here would make this case an inappropriate vehicle for resolution of such a conflict. The matter of "distinct" tests was not raised below by petitioners or argued by the parties. Neither the district court nor the Sixth Circuit addressed petitioners' tests or specifically relied on a particular test. In the context of this case, the second of petitioners' "Questions Presented for Review" is, at most, of theoretical interest.

C. This Court Should Not Substitute Its Judgment For That Of The Lower Courts By Transferring This Case To Another Forum.

In asserting that the lower courts should have transferred this case, petitioners contend that "litigants can only guess when they file suit as to the facts which will be unearthed after extensive discovery and the legal standard ultimately applied." Petition at 19. Petitioners here, however, knew from the outset of the litigation that Phillips Norway was a Delaware corporation; even the captions of their complaints so stated. They knew that Phillips Norway was subject to service of process and personal jurisdiction in Delaware. Petitioners were not "guessing" about jurisdiction; they were consciously electing to forum-shop, having concluded for their own reasons that the federal district court in Delaware and/or the Third Circuit would not be sufficiently receptive to their claims. Given the availability of Norwegian courts, even the maintenance of this suit in this country is the product of forum-shopping.

Petitioners must accept sole responsibility for the path which they and this case have traveled. Shortly after the complaints herein were filed, Phillips Norway filed motions to dismiss which challenged service of process and the exercise of personal jurisdiction in Ohio. Petitioners failed to request transfer at the district court level and only casually raised that matter for the first time on appeal. Indeed, petitioners fail even now to frame the propriety of transfer as a question for review by this Court.[8] Petitioners are simply unsuccessful forum shoppers. They cannot now be heard to assert that the interests of justice require that this case be transferred.

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[8] Supreme Court Rule 21.1 provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

CONCLUSION

There are no grounds for granting a writ of certiorari in this case. There is no constitutional issue before the Court. There are no "essentially distinct" legal tests being inconsistently applied by the federal courts. This case turns only on its own facts, and there is no "special and important reason" for those facts to be examined yet again. Accordingly, respondent prays the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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